

City of Alameda



Interdepartmental Memorandum

Confidential: Attorney-Client Privilege

Date: December 4, 2012

To: Mayor Marie Gilmore
And Members of City Council

From: Janet C. Kern
City Attorney

Re: Dispute Between City and International Association of Fire Fighters (IAFF)
Local 689 over contract clause

The attached December 4, 2012, memo regarding IAFF "Same Level" clause was authorized to be publicly released by action of the City Council on December 4, 2012.

City of Alameda



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Date: December 4, 2012

To: Mayor Marie Gilmore
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Copy: John Russo, City Manager

From: Janet C. Kern
City Attorney

Re: Dispute Between City and International Association of Fire Fighters (IAFF)
Local 689 over contract clause

You have asked for a legal risk analysis of an ongoing dispute between the City and the IAFF regarding a clause in the existing Memorandum of Understanding (MOU) between the City and IAFF relating to parity of benefits with the other City public safety bargaining units. It is the opinion of the City Attorney's Office that the City has significant financial exposure due to this grievance.

Background

Public Safety bargaining units in Alameda (police and fire) have historically had "Same Level" clauses in their MOUs. These are also called "me too" clauses and typically provide that if one bargaining unit receives a benefit, the other bargaining units automatically receive the same benefit. The dispute at issue began due to such clauses in the City's 2001-2007 MOU with IAFF. The 2001- 2007 MOU contained the following two clauses in Section 28 – Same Level:

28.1 In the event that any other City public safety bargaining unit negotiated or is granted by arbitration or a vote of the electorate, any increase in wages or fringe benefits which are greater or in excess of those provided by this MOU, then the City shall provide that same level of interest in wages or fringe benefits to the employee in this bargaining unit. This increase shall be effective on the same date and on the same basis as the wage or fringe benefit in question.

28.2 In the event the APOA and/or APMA are granted Retention Pay or Retention Pay is reinstated as a result of resolving through agreement or

arbitration, their outstanding issues regarding the granting of the 3% at 50 retirement benefit to the City's public safety bargaining units, the parties agree that Section 28.1 is not triggered and no increase in wages or fringe benefits will result to this bargaining unit. In addition, in the event APOA and/or APMA are granted any increase in wages or fringe benefits as a result of resolving, through agreement or arbitration, their outstanding issues regarding the granting of the 3% at 50 retirement benefit to the City's public safety bargaining units, the parties agree that Section 28.1 is not triggered and no increase in wages or fringe benefits will result to the bargaining unit.

In the event that during the term of the APOA and APMA MOUs, the APOA and APMA relinquish the Same Level clause of their MOUs, then the IAFF will likewise relinquish Section 28. In that event, neither the APOA, APMA, IAFF nor the AFMA will have Same Level clauses in their respective MOUs.

The next MOU covered the period January 2008 through January 2010. The City's documentation indicates the above Sections 28.1 and 28.2 were discussed during the negotiating sessions. The City and IAFF took opposing positions as to whether the two clauses should be removed from the MOU. In the end, the final executed MOU (2008-2010), as ratified by IAFF and approved by the City Council, deleted Section 28.2, but retained Section 28.1.

In October 2009, the IAFF formally invoked Section 28.1 when the APOA (police officers) received retention pay and uniform pay. The City rejected the IAFF's expectation for the "me too" provision and, hence, IAFF brought a grievance. Both then-Fire Chief Kapler and then-Interim City Manager Gallant denied the grievance, claiming the inclusion of Section 28.1 was a clerical error and was not intended by the parties to be part of the City's MOU with IAFF.

The IAFF appealed to the City's Adjustment Board, made up of four members – two representing IAFF and two representing the City. The Adjustment Board deadlocked 2-2 issuing no decision. The IAFF then sought formal arbitration. Since then, there have been settlement negotiations but no resolution. No arbitration has yet been conducted, pending resolution through settlement.

With the Section 28 provision dispute still unresolved, the 2008-2010 MOU expired in January 2010. It was eventually replaced with the January 2010 – June 2013 MOU, which was ratified by the IAFF and approved by the City Council, and remains in effect to this day. This MOU also contains the provision language from section 28.1 (but now numbered 27.1) and the dispute is still outstanding.

Conclusion and Recommendation

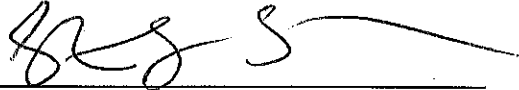
It is our understanding that former Fire Chief Kapler, former Interim City Manager Gallant and former Human Resources Director Willis are prepared to testify as to the intent of the parties to remove Sections 28.1 and 28.2 during negotiations resulting in the 2008- 2010 MOU. However, the MOU does include Section 28.1 and it was fully

executed by all parties. Furthermore, section 28.1 is again included in the current 2010-2013 MOU, and it was fully executed by all parties.

In order to refute the clear language of not one, but two MOUs, the City would have to prove that the written language is ambiguous. If ambiguous, then a Court would consider extrinsic evidence such as notes made contemporaneously during negotiations and oral testimony of participants. The City Attorney's Office believes it will be very difficult to persuade a Court to look beyond the MOU language. Even if we are successful in getting the Court to consider extrinsic evidence, our assessment is that the extrinsic evidence would not be persuasive. In fact, notes made contemporaneously during negotiations by the City's own negotiators support the IAFF's contention that there was no agreement to remove the "me too" clause from the contract.

Therefore, the City has significant exposure on this grievance. City staff has monetarily valued the claim at approximately \$4.5 Million (worksheet attached to this Memo).

The City's next MOU with IAFF for 2013 – 2017, which has been ratified by the IAFF and is scheduled for City Council consideration on December 11, 2012, contains a provision for education incentives that settles this dispute. In the new MOU, the grievance is fully and finally resolved, and the "me too" clause is no longer included.

By: 
Stephanie Garrabrant-Sierra
Asst. City Attorney

Attachment: grievance calculation worksheet.

Financial Analysis of IAFF Grievance Exposure to City of Alameda

	Retention Pay Totals on Base Pay	Plus FLSA (Estimated 5%)	Plus PERS	Total Effect
FY 07/08	369,555	18,478	143,572	531,605
FY 08/09	418,369	20,918	162,537	601,824
FY 09/10	406,475	20,324	157,916	584,715
FY 10/11	422,750	21,137	164,238	608,126
FY 11/12	466,645	23,332	181,292	671,269
FY 12/13	478,913	23,946	186,058	688,916

Projected Exposure through 6/30/13 3,686,455

FY 13/14	561,464	28,073	207,741	797,278
FY 14/15	582,512	29,126	209,704	821,342
FY 15/16	624,119	31,206	218,441	873,766
FY 16/17	698,088	34,904	237,350	970,342

Additional Projected Exposure if new MOU not implemented 3,462,727

Total Projected Exposure \$ 7,149,183